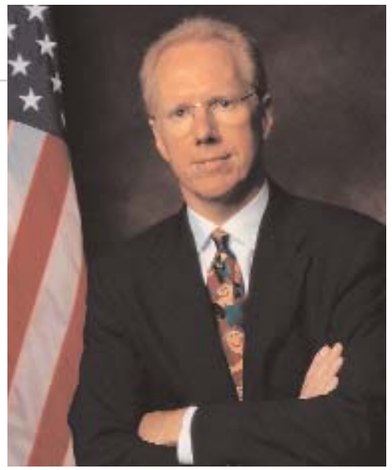
FROM THE DISTRICT ATTORNEY

Paul J. Pfingst



When police officers kiss their families goodbye and head off to work, they do so with the hope that they will neither kill or be killed.

Sometimes the day doesn't turn out as planned. Sometimes the workday includes a rapidly unfolding and unpredictable series of events involving the use of deadly force.

Few decisions are second-guessed by the average citizen more than the use of deadly force by law enforcement. Second-guessing is not necessarily a bad thing – it's important that the people who have been given the authority and capability of taking lives be held accountable for those decisions.

I've spoken with officers immediately after they were involved in a shooting incident. It's not like Miami Vice where Don Johnson walks into the sunset with a beautiful woman and gives the shooting a passing thought. In real life, officers are shaken and upset. Tears are common. They have just taken a life. That, by itself is an enormous psychological burden.

But they could also lose their family, their job, and their home. They are uncertain about the future and their career. Officers sometimes wonder if they will be able to return to work, knowing that something like this could happen again. They know that a family has lost a loved one and will suffer the grief of surviving friends and family. People will second-guess them. Often, they'll second-guess themselves. It's certainly not Hollywood.

In this issue of *Law Enforcement Quarterly*, Paul Morley, Chief of our Special Operations division, explains the procedure our office uses to review officer-involved shootings. These procedures were developed in cooperation with both police and civilian input to properly examine the results of a work shift that didn't go as planned.

LEQ

Law Enforcement Quarterly

A publication of the San Diego County District Attorney

Columns

Departments

On The Cover
When you face the ultimate confrontation - what happens next?

Features

The Law Enforcement Quarterly is published four times a year by the Office of the District Attorney, County of San Diego, 330 West Broadway, Suite 1300, San Diego, California 92101, (619) 531-3536. All inquiries or comments should be sent to the editor at this address. The primary purpose of this magazine is to provide police officers and law enforcement executives with assistance in understanding the rapidly changing aspects of the law. No portion of this publication may be reprinted without the written permission of the editor.

Greg Thompson
Assistant District Attorney

Another Heroism

Immediately after I saw the film *Saving Private Ryan*, I called my father. Like the movie's hero (played by Tom Hanks), dad was a young Army officer and among the Normandy invaders on D-Day, June 6, 1944.

We discussed his experience. They matched what I saw graphically portrayed on screen: he lost half his men before they could even get out of their landing craft; they were let out in water over their heads and some drowned; those who made it to shore were hundreds of yards from their rendezvous point amidst unbelievable carnage and chaos. Despite all of this, they improvised an assault on Nazi machine gunners and accomplished their mission.

As the movie makes clear, it was all pretty grim, not glorious. But it was still heroic.

As I hung up the phone from speaking with my dad, I was struck by a memory of an event far removed from the epic invasion of Normandy. I was in grade school and had stayed after school for basketball practice. Unbeknownst to me, practice had been cancelled. (You know the old saying: in any organization there's always one guy who doesn't get the word; this time I was the guy.) By the time I figured out that I would have the gymnasium to myself, my school bus had left.

So, *naturally*, I walked out to the street in front of Daniel Whitfield Elementary School and waited for my Dad to pick me up. I say *naturally*, because many of you would have naturally telephoned your home before walking out to await your ride. Not me.

So I stood there waiting. Teachers drove by. "Are you okay? Do you need a ride?" they asked. "I'm fine," I responded without concern. "Dad's coming."

I continued to stand, looking down Telegraph Road, expectantly. Then I saw it – the familiar sight of our red Ford station wagon. Dad pulled to the curb. I threw my gym bag and lunch box in the back seat, got in and we drove home. *Naturally*.

Now this little childhood episode may say something about the kid on the side of the road who didn't hear the announcement, didn't phone his house, didn't seem to have the good sense to worry. Hey, was this kid dense or what?

But, I believe it says something about the man in the Ford station wagon. By the way he lived his life, his son knew that he could be counted upon. When he told the teacher, "Dad's coming," he could depend upon it.

What I know today – that I did not know as a child – is that these two disparate events – an historic battle and a trivial event – both represent a kind of heroism.

Over the years in this profession, I have seen both at work. There are men and women in law enforcement who have been called upon to perform extraordinary acts of bravery. They've risked their lives to do their duty. That is heroism of the obvious kind. But more often, I have witnessed another kind of heroism – the kind that is displayed day after day over the long haul. It's earned by the cop on the street who listens with patience – even when he's out of patience. It's earned by the detective who keeps digging – even when she believes the case is hopeless. It's by the prosecutor in the courtroom who endures one setback after another, but hangs in there and makes the case.

That kind of heroism is not generally honored by medals or ceremony. It would be tough to make into a movie. Day-to-day dependability lacks dramatic punch. But it is the kind of heroism that holds us together as a community and ultimately shapes our lives. There may be no higher honor than this: to have it said of you that you can be counted on – that you are a man or woman of utter dependability. That may not be glorious; but it is heroic.

I've seen it in my work; I learned its value from Dad.

"911... What is your emergency?" "My father has disappeared. He has Alzheimer's disease and wandered away," a frantic voice cries. "Please send someone quickly."

Every day across the United States, law enforcement officers must respond to missing person reports for people who have Alzheimer's. Yet, while this type of call has become commonplace, many departments underestimate the severity of the danger that a wandering Alzheimer's person faces.

What is Alzheimer's disease?

Most people are familiar with the term "Alzheimer's disease" even if they do not fully understand the diagnosis. Named for the German neuro-pathologist who first recognized the disorder in 1906, Alzheimer's is one of a collection of diseases that fall into a category known as dementia. Derived from the Latin term, mind and away, dementia is a term used to indicate a loss or reduction of mental capacity severe enough to interfere with daily functioning. It does not mean or signify stupidity, insanity or retardation.

Dementia refers to a variety of symptoms, but is not a disease in itself. Dementia symptoms include memory loss or confusion, a reduction in cognitive abilities and difficulty with language, perception, personality judgement and coordination.

Approximately 50 percent of dementia cases are due to Alzheimer's; 20 percent are due to multi-infarct disease (caused by small strokes in the brain) and another 20 percent result from a combination of Alzheimer's and multi-infarct disease. The remaining 10 percent are from other illnesses, such as Parkinson's disease, Huntington's chorea, Pick's disease, and AIDS-induced brain lesions. A very small percentage of this final category is attributed to virus-based diseases, such as Creutzfeld-Jakobs disease (commonly known as mad cow disease).

An Article By Kimberly Kelly

Photos by Erika Kyte

How is Alzheimer's Diagnosed?

Alzheimer's disease (AD) is distinguished from other forms of dementia by characteristic changes in the brain. These changes include a 50 percent reduction of acetylcholine, a necessary brain chemical, and the formation of plaques and tangles. These plaques and tangles are abnormal growths or accumulation of certain proteins that build within and surround the brain cells. As a result of these changes, brain cells are damaged and eventually destroyed, which results in the previously-described symptoms of dementia.

Alzheimer's disease is considered to be a disease of exclusion. This means that all other possible causes, such as infection, disease, alcohol/drug abuse and mental illness must be ruled out before any probable diagnosis of Alzheimer's is given. This is accomplished by undergoing a complete physical, neurological and psychological examination.

However, due to the nature of the disease, a diagnosis of AD can only be confirmed by autopsy of brain tissue after death.

Progression of the Disease

The affected individual suffers a loss of thinking or learning capabilities of sufficient impairment to impact their daily life, whether it is social or occupational functioning.

Changes are often slow to progress, and thus difficult to detect in the early stages. These symptoms may include short-term memory loss, anxiety or irritability, difficulty in conversation, or inability to complete involved processes, such as balancing a checkbook or map orientation.

Eventually, as the diseases progresses, impairment becomes more severe and obvious. The person makes glaring mistakes in his work, repeats conversations or questions, and loses more of his ability to remember persons, places and events. Short-term memory loss deteriorates into severe memory problems. Impaired judgement and radical personality changes are also evident.

In addition to the changes that occur to memory and cognitive abilities, Alzheimer's patients also experience significant impairment to visual, speech and motor skills.

Such a loss of abilities can lead to further problems such as anxiety, paranoia, hallucinations, frustration or irritability, anger aggression or violence, withdrawal, pacing and wandering.

Wandering

Alzheimer's patients often come to the attention of law enforcement officials because of wandering. As the affected patient loses more and more of his memory, he will often go in search of a particular item, person, or place. These persons are not easily distracted idiots who have simply gotten lost; the brain changes and visual impairments that occur in Alzheimer's patients cause an irrepressible urge to wander.

Wandering has proven such a common behavior that Alzheimer's experts predict that 60 percent of all AD sufferers will wander away from safety at least once during the course of their illness. Many will wander an average of six to eight times before the victim is placed into a residential facility or an outside qualified caretaker/nurse is brought into the home.

Lost in the Labyrinth

Wandering Alzheimer's patients rarely find their own way home. When they are found in or near a home, the likelihood is greatest that they had not wandered far to begin with.

Many become lost or disoriented from their own home or care facility, but an increasing number are being reported missing from malls, parks, zoos and

other public arena. These persons, already in an unfamiliar environment, are particularly unlikely to be able to navigate themselves to safety.

Search record and anecdotal history from law enforcement officers show that when people encounter wandering Alzheimer's patients, they are often ignored, considered homeless or given aid, but not reported to responsible agencies.

While certainly better than no identification, Medic-Alert or Memory Bracelets, like those issued by the Alzheimer's Association's Safe Return program, are not a guarantee that the public will recognize or report wanderers.

A Death March

Because the Alzheimer's patient is unable to recognize danger, they may wander across roads or highways, fall into bodies of water or become entrapped in heavy brush.

This behavior is extraordinarily important to understand, since many law enforcement agencies will not consider a person over the age of 18 to be missing until 24 hours have passed.

Studies in Virginia in 1992 and 1995 show that wandering Alzheimer's patients faced a 46 percent mortality rate if not found within 24 hours. Information provided by the Emergency Services Council of British Nova Scotia report death rates of 70 percent in similar circumstances. Records by the Twin Peaks/Rim of the World Search and Rescue team show 100 percent mortality rates for patients over the age of 60 who are not found within 24 hours.

Most wanderers succumb to personal or environmental hazards. The three leading causes of death for wanderers are heart attack or stroke, exposure to the weather and drowning. Rates remain the same for those wanderers lost in cities and in rural areas.

In order to understand how your missing subject may behave or react to his environment, you must understand Alzheimer's disease. Without understanding the impairments in thinking, logic, emotion, vision and other critical areas of the brain, officers may be less likely to attach a significant risk to these persons.

By educating officers and other public safety personnel, we can further increase our opportunities to find and return to safety these missing persons.

Kelly is founder and director of Project Far From Home, an Alzheimer's education and search management program designed to teach law enforcement, search & rescue, the fire department, and emergency medical services about Alzheimer's patients. For information about managing the search for Alzheimer's patients, call Kelly at (619) 676-9778. **LEQ**

Kimberly R Kelly is a reserve deputy the with San Diego County Sheriff's Department, assigned to the Search and Rescue Bureau. She was named 1996 "Reserve Deputy of the Year."

Recommendations for Finding Alzheimer's Patients

- Treat missing Alzheimer's patients as missing at-risk persons. Do not wait the standard 24 hours to begin a search.
- Notify the Alzheimer's Association's Safe Return program
- Notify the media. Often missing persons are spotted by people who have seen their face on a news report.
- Even if the missing person has a history of wandering, begin looking right away. It could mean the difference between life and death.
- Consider calling search and rescue. There is no charge, and they will respond even in city areas.

Tips for Effective Communication with the Alzheimer's Patient

Suggested Communication Techniques

- Touch and establish eye contact.
- Use gestures to augment words, hold hands out, smile.
- Be attentive to messages communicated by the patient's body position and movement.
- Find a quiet setting; reduce environmental confusion.
- Speak in concise, clear sentences.
- Take advantage of calm moments to express warmth and caring.
- Aberrant behavior is less likely to be motivated by unconscious conflict than by needs or fears.
- Construct sentences using the words the patient uses.
- Listen to the patient, even though his words do not make sense.
- Keep your voice low and calm.
- The patient may respond to verbalization very slowly, so allow sufficient time.
- Only one person, ideally a predetermined "subject advocate" should approach the patient. Seeing a large number of people and/or search dogs as well as hearing the noise associated with field teams can seriously panic the Alzheimer's patient.
- Call out to the subject as you come near and always approach from the front, slowly and deliberately.
- Introduce yourself. Explain that you are here to help and you want to bring them home. Alzheimer's patients can be suspicious or paranoid of new people.

Suggested Search Techniques

- Appoint a subject advocate. This person should have medical experience, a calm and reassuring manner and an understanding of Alzheimer's behavior. Consider whether the patient will best respond to a man or a woman. The advocate must be committed to stay with the mission until the patient is found and then travel with the patient while he is transported to a medical facility. The advocate will be the one person who is a constant, calming influence on the subject during this ordeal.
- Use tracking dogs early on at Point Last Seen (PLS) and along roadways. Air scent dogs can be deployed into drainage ditches and streams.
- Combine trackers and dog teams into methodical search patterns. Use other personnel for hasty teams.
- Thoroughly search the residence/nursing home, the surrounding grounds and buildings every few hours.
- Search heavy briar and brush.
- Dog teams and ground sweep teams (in separate sectors) expanding from PLS.
- Air scent dog teams and ground sweep teams task 100 yards (initially) parallel to roadways.
- Search nearby home sites.
- Deploy divers into nearby pools, creeks, ponds and lakes.

A Reality Check

- One in 10 people over the age of 65 and nearly half of those over 85 have Alzheimer's disease.
- About four million Americans suffer from Alzheimer's disease. There are about 40,000 Alzheimer's victims in San Diego County.
- A person with Alzheimer's can live 20 years or more from the onset of symptoms.
- Nearly 60 percent of patients wander from their family or caretaker's home.
- Most Alzheimer's sufferers will wander six or eight times before being placed in a residential facility or an outside, qualified caretaker/nurse is brought into the home.
- Every hour, there is at least one full-fledged search for a lost Alzheimer's patient somewhere in the U. S.

This information was summarized from materials provided by Kimberly Kelly and "Project Far From Home." For complete training and information, call (619) 676-9778.

Mike Carleton

Civil Liability: The Good, The Bad & The Ugly (and The Best)

The Best

Thanks to San Diego County Counsel Ricky Sanchez and UCSD Medical Center for defeating "Custody Restraint Positional Asphyxia."

A 35-year-old man lost consciousness and died two days later after Poway Sheriff's deputies placed him in a four-point restraint (hog-tie). The hospital's pulmonary consultant believed the cause of death to be cardiac arrest possibly due to exertion and meth ingestion. But the medical examiner's autopsy report concluded that he died from positional asphyxia caused by the application of a hog-tie.

The man's wife, parents and children sued for wrongful death, civil rights violation, etc. The key support for the plaintiff was Dr. Donald Reay, a forensic pathologist and the originator of the hog-tie-positional asphyxia cause of death hypothesis. The plaintiff offered to settle this case for a mere $1.4 million (defendant says the demand was actually $4 million).

County Counsel Ricky Sanchez wasn't satisfied with the determination that the hog-tie restraint was the cause of death. He asked UCSD Medical Center to study the effects of the prone hog-tie restraint. The study conclusively determined that the prone hog-tie position **does not cause asphyxia**. The study was published in a Nov. '97 medical publication, prior to the trial.

As a result, at trial, Dr. Reay retracted his hypothesis, acknowledging it was medically fallacious! (Incredible, when did you ever hear of that happening... ever... and kudos to Dr. Reay for having the intellectual honesty to do so!) The jury returned a defense verdict.

Thanks largely to the efforts of Sanchez and UCSD, this county, as well as all others, throughout the country, will be spared millions of tax dollars on what is now proven to be a bogus theory.

Ann Price v. County of San Diego, 941917.

The Good

Doper shot while trying to get away sues for excessive force!

In a case that demonstrates the lengths some plaintiffs will go to tap the rich resources of the public trough, a doper sued for damages associated with being shot three times by deputies. Jeffrey Helund purportedly just dropped off a CI, when sheriff's deputies tried to arrest him. He fled in his car, crashing into an unoccupied vehicle in a parking lot. He was shot in the jaw, neck and arm. In his criminal case, he was convicted of possession of cocaine but the jury hung on the charge of assault on the deputies. In the civil case, he claimed deputies didn't need to shoot him. Deputies testified Helund tried to run them over and was shot to try to prevent him from ramming a vehicle, which they feared was occupied at the time. The plaintiff offered to settle the matter for $500,000, but sheriff's lawyers refused to give him a dime... so did the jury, which returned a defense verdict! *Jeffrey Hedlund v. Patrick MacCauley, Bret Uhlich, County of Ventura, 145593.*

The Bad

Excessive force case settled for $125,000.

The plaintiff's family was celebrating their son's 15th birthday when they claimed police 'stormed' into their residence. One son was allegedly maced for not opening a locked gate fast enough; another was allegedly beaten after demanding to know why police were in the house; and a third was struck in the mouth with a rifle. The father said police choked him unconscious. Officers claimed they stormed the house because they had heard shots. *Case I.D. confidential.*

The Ugly

Court affirms $15.9 million judgment against L.A. County.

A $15.9 million verdict (no, it's not a misprint) in favor of 36 partygoers at a '89 family bridal shower has been ordered paid following an unsuccessful appeal.

The jury returned the verdict in August 1995, finding that sheriff deputies brutalized the plaintiffs when a bridal shower was stormed and many of the attendees arrested. Evidence was presented that several of those arrested were beaten.

Deputies claimed that after responding to loud noise complaints from neighbors, rocks and bottles were thrown at them. Plaintiffs, however, produced a neighbor's videotape as evidence that nothing was thrown and that partygoers tried to comply with deputies' concerns over the noise level. *Talamaivao v. County of Los Angeles, B097631.* **LEQ**

Mike Carleton is a Deputy District Attorney and Chief of the DA's El Cajon office. He served for several years as the DA's liaison to local police agencies.

Promotions

Escondido Police Chief Duane White announced the following promotions: Lt. Cory Moles, hired 12 years ago as a police officer trainee, has been promoted to the rank of captain. Sgt. Charles Milks, a 19-year veteran of the department, was promoted to police lieutenant. Detective Jim Lannigan was promoted to the rank of police sergeant.

Recent promotions at Chula Vista Police Department included Sgt. Gene d'Blaing to lieutenant and Agent Brent Ballard to sergeant. Ben Chassen, Joe Cline, Vern Sallee and Eric Tarr were promoted from officer to agent.

New sergeants at National City Police Department are Dan Fabinski, Keith Fifield and Scott Ketchum. Promoted to the rank of senior officer were Parris Bull, Matt O'Deane, Robert Rounds and Charles Willkomm.

San Diego Police Chief Jerry Sanders announced the following promotions: Capt. Barbara A. Harrison was named an assistant chief. New captains are Louis J. Scanlon and Ronald G. Newman. New lieutenants are Michael S. Cash, Gregory T. Drilling, Alicia A. Lampert, Miguel Rosario and John C. Leas. New sergeants are Daniel E. Cerar, Daniel E. Douglas, Ronald P. Larmour, Peter A. Morales, Michael L. Parga and John E. Smith.

Carlsbad Police Department announced these promotions: Don Metcalf to captain, Dale Stockton to lieutenant and Chris Boyd, Marc Reno and Larry Stockton to sergeant.

Classes Offered

Southwestern College offers two investigative courses and both are POST certified. Each is certified for a minimum of 96 hours of "Continuing Professional Training."

Basic Criminal Investigations, 96 hours. Offered Fall, two nights a week for a total of six hours per week; and Spring, three days a week, for a total of six hours per week. This is a four unit class and meets the degree requirements for the Administration and Justice degree (A.S.) when you select the Law Enforcement option.

Evidence Technology, 96 hours. Offered Spring, two nights a week for a total of six hours per week. Prior experience or Basic Criminal Investigations course required for entry into the class. This is a comprehensive evidence class conducted with small class sizes. Meets the requirements for the Forensics option of the Administration of Justice degree program when taken with Basic Investigations.

Southwestern College also offers two Criminal Justice degree programs including a transfer program and certificates. For more information, contact E.H. Selby, professor at (619) 421-6700 ext. 5601.

Law Enforcement Quarterly

Published by the Office of the District Attorney

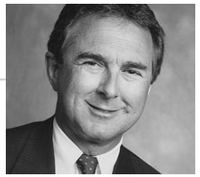
Paul J. Pfingst, publisher
Denise Walker Vedder, editor
Blaise Nauyokas, publication design

Greg Thompson, Mike Carleton, George W. Clarke, Reggie Frank, Robert C. Phillips, columnists

Edward J. L. Jex, Kimberly Kelly, Marty Martins, Paul M. Morley, Hector M. Torres, contributing writers

Sanae Yanagawa, design/photo illustration
Marty Martins, special advisor
Steven J. Casey, editor emeritus

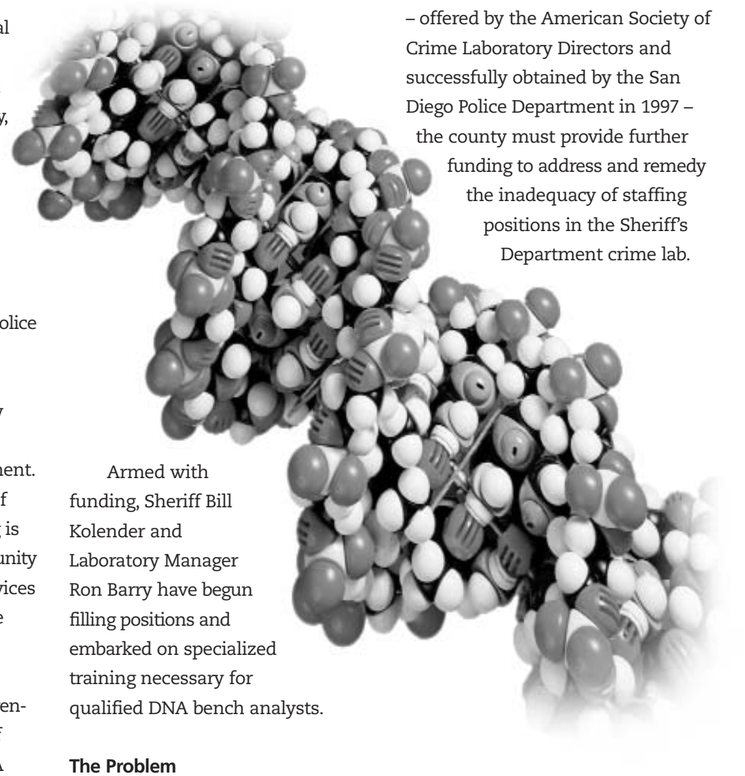
George W. Clarke



Solving rapes and murders with 21st century technology...reality or a pipe dream?

Imagine a consolidated forensic DNA laboratory to fight crime in San Diego County. Evidence that doesn't have to leave the county. Experts that can come to court with minutes' notice.

For years, many in the San Diego law enforcement and legal communities have promoted the benefits of a single, regional crime laboratory. Such a laboratory, they contend, would better serve all the forensic needs of our county, including the city of San Diego.



The Present

Since 1992, the San Diego Police Department has provided DNA typing services.

The unit, however, can only perform DNA typing in cases investigated by its own department. The sheer number and extent of casework for which DNA typing is necessary eliminates any opportunity for the unit to provide DNA services for cases originating outside the San Diego City limits.

Aware of this problem and concerned about the cost, inconvenience, and detrimental effects of sending evidence to private DNA laboratories, the county Board of Supervisors dedicated funds to the San Diego County Sheriff's Crime Laboratory to begin the formation of a DNA typing unit in that agency.

Armed with funding, Sheriff Bill Kolender and Laboratory Manager Ron Barry have begun filling positions and embarked on specialized training necessary for qualified DNA bench analysts.

The Problem

Unfortunately, this funding provided by the Board last year represents only a start. Critical to the success of any crime laboratory is a commitment to the provision of reliable and quality forensic services.

The ability of any laboratory to offer quality services is inextricably woven together with the dedication of sufficient staff to several forensic disciplines. The greatest single measure of that commitment in the forensic sciences today is laboratory accreditation.

In order to obtain accreditation – offered by the American Society of Crime Laboratory Directors and successfully obtained by the San Diego Police Department in 1997 – the county must provide further funding to address and remedy the inadequacy of staffing positions in the Sheriff's Department crime lab.

The remedy? Dedication of county funds to directly provide bench analyst positions to meet long-standing needs in fields such as latent fingerprints, blood alcohol, toxicology, drug chemistry, and, yes, DNA. The desired result is a laboratory that gains national accreditation. The more important benefit: a laboratory that can provide essential services to investigating officers, local prosecutors, the courts and ultimately to juries who decide our most serious cases.

The Problem, Part II

The problem, however, will not end with a fully-staffed Sheriff's crime laboratory. DNA typing presents a unique situation in the modern crime laboratory.

Part of the challenge results from the very power of DNA typing in the investigation and prosecution of criminal cases. Armed with the power of DNA testing to exclude or include potential suspects, jurors now expect the government to take all possible steps to determine who could have left each bloodstain, semen stain or other biological evidence. When the stakes are high – decades-long sentences for forcible sex crimes and life imprisonment or death for murders – the expectations of jurors rise accordingly.

Last year Attorney General Janet Reno invited me to serve on a two-year "National Commission on the Future of DNA Evidence," sponsored and administered by the U.S. Department of Justice.

In that role, through both commission and working group meetings, I have seen first-hand the problems encountered by forensic DNA typing labs at the local, regional, state and even federal level. Casework DNA backlogs at the Federal Bureau of Investigation, for example, frequently exceed a year in length.

This demand has resulted in a transformation of the working crime laboratory from an investigative arm of law enforcement to a trial preparation tool of prosecuting agencies.

Further complicating the dedication of limited resources is the development of convicted offender DNA databases. California, like all 49 other states and the federal government, requires defendants convicted of certain violent crimes (including sexual and other assaults) to provide a sample of blood and saliva.

The California Department of Justice is similarly mandated to store, analyze and maintain a database of DNA profiles developed from those samples. The data can then be used to solve crimes committed by those same offenders following their release from prison or jail custody.

But insufficient funding and a significant change in DNA technology – allowing for more rapid and cost-effective evidence and database analysis in the near future – has left California and most other states deeply behind in the race to compile offender DNA profiles.

The costly result is the continued inability to solve suspectless crimes. Rapists and murderers are walking our streets when the information needed to identify those attackers lies in freezers in our own state.

A Consolidated DNA Laboratory

Both San Diego Police Chief Jerry Sanders and Sheriff Bill Kolender have endorsed the concept of a consolidated regional DNA laboratory. Space and facilities for such a combined unit already exist at the Sheriff's Crime Laboratory in the former Clairemont Hospital near Genesee Avenue.

How will such a consolidated laboratory solve the problems already described? By combining staffing and other resources, casework will be more efficiently and rapidly addressed. Equally importantly, a local database of offender and evidence samples can be created, enabling the identification of attackers in many unsolved cases.

The bottom line? The community of San Diego will benefit from a modern and effective countywide forensic DNA laboratory. Both the exoneration of innocent suspects and the prevention of unnecessary rapes and murders of victims in this community are immediate and tangible benefits of such a facility. **LEQ**

George C. "Woody" Clarke, a Deputy District Attorney in the Superior Court Division, is the DA's forensic expert and liaison to all crime labs in San Diego County.

Reggie Frank

Off-Duty Survival

Phillip Dvorak Illustration

Death in the line of duty has been the subject of studies and reports for several decades.

A new area of study, however, is deaths of officers resulting from off-duty confrontations.

Recent FBI Uniform Crime Report studies determined off-duty confrontations account for approximately 12-14 percent of officers killed annually. Interestingly, the California POST "Law Enforcement Officers Killed and Assaulted" Committee has found similar results. In California, off-duty confrontations are responsible for about 14 percent of officer deaths annually.

Police agencies accept that officers have and will become involved in off-duty incidents. The majority of these confrontations have a positive outcome. But, there are several incidents where the outcome was tragic and the officer(s) involved were injured or killed. As a result, law enforcement agencies have finally begun to provide training and materials dealing with off-duty survival. Since 1991, the materials available to trainers on this subject have more than doubled. Training materials including quality videos are now available and in use.

To illustrate this topic and its importance, let me give you a brief synopsis of some recent off-duty incidents in California. Aside from my conclusions at the end of each story, make your own assumptions as to what you may have done if faced with a similar incident or circumstances.

INCIDENT #1:

While on a family vacation, a veteran off-duty officer from an Orange County agency went into the lobby of a large hotel in the San Diego area. Within moments, two armed robbers entered the lobby and announced their intentions. One of the suspects was armed with a sawed-off shotgun; the other with a handgun.

The officer was carrying a two shot derringer concealed in a wallet holster, located in his back pocket.

At one point during the robbery, the officer quickly discarded his police identification. When the officer was ordered to give up his money, he made the decision to draw his weapon and take on the suspects. The officer drew and fired one round from the derringer, narrowly missing the suspect. He attempted to fire again, but the gun jammed in the wallet holster. The robber responded by firing a blast from his sawed-off shotgun, striking the officer in the arm, causing severe injuries. The suspects then fled from the business. The officer's wife and children, who were waiting for him outside in the family truck, witnessed the shooting.

Fortunately for this officer, he recovered from his wound and returned to duty with his agency.

Unfortunately, the opposite usually occurs. Officers go out and spend several hundred dollars on small, light and easily concealable weapons to carry off-duty, or for back-up use.

This is especially true here in Southern California, where we tend to wear light clothing. Many officers like to carry small weapons that can be concealed on the body. Even officers that use fanny packs or other similar items still tend to carry small, light and compact handguns.

These same weapons, generally because of their size, are going to be loaded with a small caliber round. Any reputable ballistics expert will tell you a small caliber round has a low threat-stopping rate.

In reality, we are sacrificing safety for convenience and comfort.

ISSUES TO THINK ABOUT/LEARNING POINTS:

1. Weapon type and method of carrying.

When I am asked by officers, "What should I carry off-duty?" I respond, "The same weapon you carry while on duty." This is a very easy question for me to answer. What weapon are you most familiar with? What weapon are you most proficient with? What weapon is most likely loaded with ammunition that you have confidence and experience with? What weapon do you shoot the most and qualify with regularly? Which weapons will your agency likely support your use of, and have records of qualification on?

2. Police Identification.

Identification as a law enforcement officer can be a major factor during an off-duty incident. Although we are required to carry our official police identification with us at all times; the method of carrying it is up to us.

In this episode, the officer made the decision to discard his police ID

hoping to avoid being identified. How do you carry your police ID off-duty? Is it easily seen when your wallet is opened or when you take out money or credit cards? Some officers have begun carrying two sets of identification. One contains their regular identification; the other contains their law enforcement credentials and associated documents. During robberies of a person, most suspects are intent on quickly obtaining your money and credit cards. By carrying currency, credit cards and regular ID separate from the police ID, you may possibly avoid the worst case scenario.

INCIDENT #2:

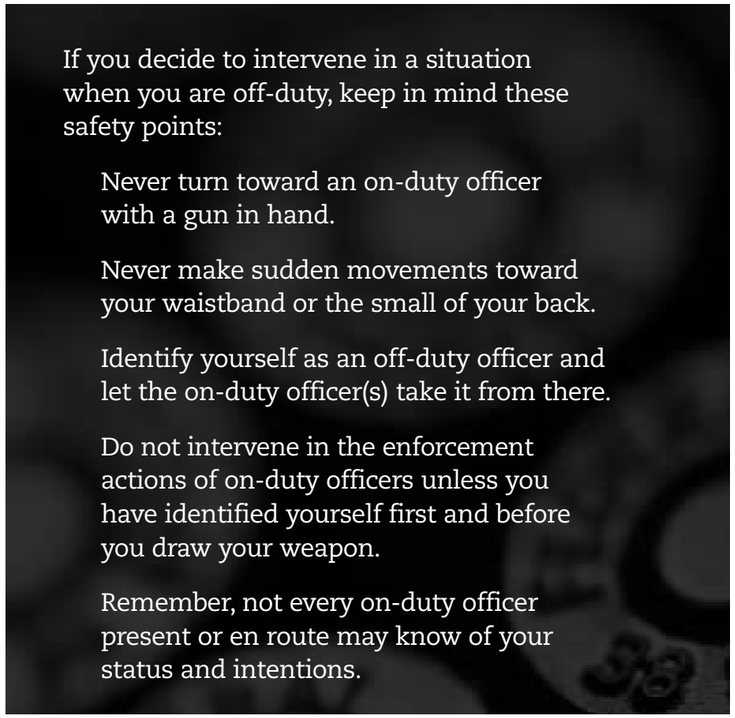
An off-duty officer went into a large supermarket on a Friday evening to cash his check and purchase groceries. He was dressed in typical Southern California summer attire – shorts, a tank top and a fanny pack. Inside the waist-worn fanny pack was his wallet, police ID and a .380 caliber semi-auto pistol.

While the officer was standing in one of the checkout lines, three suspects armed with handguns entered the market and announced their intent to commit a robbery. Two of the suspects began hitting the registers while the third acted as lookout/cover.

According to subsequent witness statements, the officer made no immediate attempt to intervene, apparently choosing the role of good witness.

Then suddenly, the suspect closest to the officer yelled commands to a bag clerk, who did not move very fast. Without warning, the suspect began pistol whipping the bag clerk about the head. At this point, the officer discreetly drew his weapon. The officer yelled "Police, stop" (or words to that effect). When the suspect turned toward him, the officer fired his weapon, killing this suspect.

This officer had been voted Officer of the Year at his agency and had just been selected for the SWAT Unit. According to comrades, he was tactically sound and extremely proficient with his weapon.



Unfortunately, our bullets do not separate upon exiting the barrel of a weapon and strike multiple bad guys at one pull of the trigger. As soon as the officer fired, the remaining suspects opened up on him. He did manage, however, to fire at one of the other suspects, wounding him in the leg.

Though attempting to use available cover, the officer was struck in the side of the head and killed instantly. The suspects fled the store and were arrested when they went to a local hospital for treatment of the suspect's leg wound.

I attended a POST "Law Officers Killed" committee meeting shortly after this incident. The investigating homicide lieutenant made a presentation to us on this case. At the conclusion, he felt the only thing the officer did wrong was to identify himself as a law enforcement officer.

I am not advocating that we stop identifying ourselves as officers during enforcement actions on or off-duty. But most, if not all, departments' policies and procedures, require officers to identify themselves *unless* the identification would place the officer or any other innocent person in a position of jeopardy.

Clearly, the officer in this incident was perfectly willing to remain a good witness. He intervened only after watching a helpless worker get his head bashed in. Given the circumstances, I do not know of any officer who would stand there and not intervene in some fashion.

ISSUES TO THINK ABOUT/LEARNING POINTS:

HAVE A PLAN. What would you do if faced with the same situation? Throw in another variable: what would you do if a spouse or one of your children were standing next to you?

Trainers always preach to officers, "play the 'what if' game" and "have a plan" in responses to on-duty incidents.

Have you ever played the "what if" game involving something that might happen while off-duty? You should. It is an excellent practice, not to mention acceptance that these situations do happen.

Make sure you realistically envision yourself performing with the equipment you carry. Be realistic. Never picture yourself losing, only winning.

INCIDENT #3:

An off-duty deputy sheriff was shopping at a large stereo outlet store in the San Bernardino area. He overheard and then saw a disturbance between a man and woman in one of the aisles.

The deputy was horrified to suddenly see the man draw a large caliber pistol, place his arm around the woman's neck and begin dragging her from the store. Unbeknownst to the deputy, the man was the woman's estranged husband.

The deputy followed the couple outside. From a position of partial cover, he identified himself as a deputy sheriff and drew his weapon. He ordered the suspect to drop his weapon and release the woman. Instead, the man fired at the deputy.

The bullet struck the deputy, severely wounding him. The man walked up to the fallen deputy and yelled incoherently. He then fired more shots at the deputy. The deputy raised his arms just as the man fired a second volley of shots at him. The man then turned and fired at his estranged wife, killing her. The deputy survived this shooting, but sustained extensive wounds to his arms. He was unable to return to full duty due to the extent of his injuries.

ISSUES TO THINK ABOUT/LEARNING POINTS:

By drawing his weapon and using available cover, the deputy appeared to be thinking and planning for the worst. But the deputy did not have a clear shot at the suspect and could only hope for compliance to his commands. Unfortunately, this did not happen and the suspect got off some very lucky shots. An alternative response would have been to observe the man's actions once he took the female from the store. You decide – What would you have done?

INCIDENT #4:

A court bailiff from Los Angeles County was at home, taking the trash to the curb, when his wife alerted him to a man approaching quickly on foot. The unarmed officer, turned and approached the man, who then began to run away. The officer chased him. The suspect suddenly turned and fired a handgun at the officer. Several rounds struck the officer, killing him.

The suspect was later arrested and believed to be a carjack suspect looking for a victim.

ISSUES TO THINK ABOUT/LEARNING POINTS:

Sometimes, we do some strange things off-duty that we would never think of doing on-duty. Would you ever pursue a subject alone, with no weapon, for behavior that only drew your suspicions? What would have been the extent and result if you caught the suspect? How many times have you chased someone on foot only to think, "What am I going to do when I catch him?" and "What charges or crime do I have?"

These incidents should get you thinking about your actions in similar situations. Identify the shortcomings, hazards and differences between being involved in an off-duty versus on-duty confrontation.

Consider the following:

Mind set.

While on-duty, your mind is alert and focused on work. While off-duty, your mind is still focused on the tasks at hand, but rarely do these tasks involve police action. Your mind is dealing with people, places and things that are probably personal in nature and involve matters such as socializing, shopping, vacationing, errands, etc.

Environment.

Whether working a beat or an investigative assignment, most of the time we know the area, and the people pretty well. Off-duty, we may not know the environment at all. If

Street Smarts

we suddenly are involved in an enforcement action, we may not know the area we are in or how the people present may react.

Equipment.

On-duty, we are equipped with the necessary safety tools to get the job done. Off-duty, we may or may not have some or all of the tools. Equipment we are not likely to carry off-duty includes:

1. Guns (Yes, some officers elect not to carry off-duty)
2. Extra magazines, speed loaders (extra ammunition)
3. Bullet proof vests
4. Radio
5. Handcuffs
6. Extra magazine
7. Uniform (identification)
8. Partner (cover officer)
9. Impact weapons
10. Chemical agent

Guns are on the list because many agencies leave it up to the officer whether to carry their weapon while off-duty. There are documented cases of off-duty officers who became involved in deadly violent confrontations and were not armed. I think some of us in the profession feel a badge or voice identification alone will take care of problems or cause people to stop what they are doing.

On the contrary, many incidents have escalated to violence after the officer has identified himself.

Family.

Many an officer has become involved in a situation because some action was taken or perceived toward a family member. Emotion-based involvement is a pitfall in our profession, causing damage to both careers and our health. Inform your family what to do if you stumble upon or are faced with an event.

Keep in mind the ages of your children. The last thing you need while facing a possible violent confrontation is a five-year-old trying defensive tactics or yelling that their mom or dad is a cop.

Three of four off-duty California peace officers killed between 1990-1994 had family members present when they chose to initiate action.

Recognition.

Many of us believe the badge is a quick answer to many situations. Yelling orders or commands to suspects is usually not effective. They will claim ignorance or disbelief of your position as a law enforcement officer as the reason they struck out.

A case in point. In Los Angeles County, an off-duty deputy sheriff stopped a small child left alone on a city street. While speaking to the child and later the father, a second man appeared. He asked the unidentified deputy why he was meddling in their affairs.

The deputy brushed his shirt back, exposing his handgun, and told the man to leave. Instead, the man drew his own pistol and fired one round into the off-duty deputy's head, killing him. The suspect was later acquitted after a jury believed he acted in self-defense.

Responding Officers.

You have just intervened in a situation and are standing with your gun drawn and pointed at another person. Unless you are immediately recognized, the officers are going to treat everyone as suspects until they have the situation under control. (Remember, you would do the same thing if you were one of the uniformed officers.)

There are several cases where an off-duty officer was shot and killed by on-duty officers because he turned toward them with a gun in hand.

In one particular case, an off-duty officer witnessed two armed men robbing a taxi driver. He drew his service weapon, approached the suspects and identified himself.

An on-duty uniformed officer saw the situation and ordered everyone to drop their weapons. The two robbers immediately obeyed, but the off-duty officer turned toward the on-duty officer. Fearing for his life, the on-duty officer fired, killing the off-duty officer.

Interviews With Cop Killers:

Two members of the FBI Behavioral Science Unit, Ed Davis and Anthony Pinizzotto interviewed suspects involved in the killing of off-duty officers.

In one case, a suspect shot and killed an off-duty officer who identified himself and tried to intervene during a bar robbery.

According to the suspect, if the officer had remained seated and only observed, he probably would not have shot him.

In a second case, an off-duty officer and his wife were the victims of an attempted car-jacking. The officer identified himself and drew his service handgun. He was immediately shot and later died.

When interviewed, one of the suspects said the officer and his wife would not have been harmed if they had not resisted.

Unfortunately, neither officer is around to tell his side of the story. The question of whether officers should be armed while off-duty has been the subject of considerable debate. While such policies are left to the discretion of individual agencies, the fact remains: even unarmed, off-duty officers still take enforcement action and sometimes get killed.

I can only speculate that since our profession began, officers have been involved in enforcement activities while off-duty. Only recently has there been any discussion or focus toward identifying deadly off-duty incidents and providing any type of officer safety-related training in this area. I hope this trend will continue.

I would like to thank Ed Davis and Anthony Pinizzotto of the FBI Behavioral Science Unit for their article, *Off-Duty Survival*, and making it available to the law enforcement community. Thanks also to the Commission on POST for including "Off-Duty" as a training block dealing with Officer Safety.

Lastly, I would like to thank all the men and women of our profession who continue to be open about their own off-duty incidents and allowing me to use their stories in the classroom and in this column. **LEQ**

Street Smarts

Off-Duty Survival: Have a Plan

- Be AWARE. An off-duty confrontation CAN happen to you.
- Know your environment.
- Play the "what if" game.
- Involve your family in the "thinking" process.
- Carry authorized weapons and ammunition you are proficient with. Do not compromise safety and performance for comfort.
- Carry extra ammunition. If you can, carry handcuffs.
- Do not carry two shot derringers.
- Identify and locate ALL suspects before doing anything.
- Do not hesitate to get involved as a witness only. Any officer who has been there will not second guess or ridicule you.
- Swallow your pride. Don't let your ego or your emotions make your decisions for you.
- Don't advertise yourself and profession. Ball caps, t-shirts and personalized license plates look good at the annual BBQ, but are not for wearing in public. You are asking for uninvited trouble or worse.
- Know your capabilities. If given the opportunity, take stock of the equipment you have along with your present capabilities before doing anything.
- Always identify cover and concealment BEFORE taking action.
- IF IN DOUBT, GET OUT. Give yourself an exit for a tactical retreat – the "run like hell" doctrine for when things get bad.
- Take the "Off-Duty Survival" class offered through In-Service training at the Regional Academy.

Sgt. Reggie Frank is the San Diego Police Department's rangemaster. He is a former academy instructor on officer safety.

Special Report

By Paul M. Morley
Deputy District Attorney

"SHOTS FIRED SUBJECT DOWN" WHAT HAPPENS NEXT?

The Office of the District Attorney has conducted reviews of all shootings in the line of duty by San Diego County peace officers since the mid-1970's. Reviews were assigned to the Special Operations Division in 1985. The current District Attorney made several reforms to the review process and drafted a review protocol agreed to by all local agencies. The goal of this article is to describe the purpose and nature of the District Attorney's review function. No discussion of shootings by federal agents is included.

Although there is no statutory mandate for the District Attorney to review officer involved shootings and other use of deadly force, the practice has developed over the last few decades in nearly every major California county. In this County, the Sheriff and chiefs of police for all departments have requested the District Attorney to conduct such reviews. The District Attorney is the logical agency to perform this function since no other agency has the independence, experience, and access to all criminal justice agencies to make the kind of thorough and impartial review the public demands. There are some significant procedural differences between the counties, but the San Diego procedure is clearly in the mainstream.

The purpose of the District Attorney's review is often misunderstood. The purpose is not to review department policies and procedures, tactical considerations, or potential civil liability. Those subjects are best left to the Sheriff and police chiefs. The purpose is to provide an independent review of all shootings and other use of deadly force, fatal and non-fatal, to assure the public that San Diego peace officers are performing their duties in a non-criminal manner. The process determines the legality of the shooting, not the wisdom of the officer or whether a better way of dealing with the situation was available. Those are matters for public discussion but rarely involve the decision on criminal charging. The result in nearly all cases has been to find the actions of police officers and deputies involved in shootings in the line of duty were legal and non-criminal. Of the over 450 officer-involved shootings reviewed by this office since 1976, only two resulted in the issuance of criminal charges against an officer.

Shortly after Paul Pfingst became the District Attorney, he began an examination of the officer involved shooting review process. Mr. Pfingst had prior police review board experience and had prosecuted a CHP officer for murder. He opened dialogues with the Sheriff, chiefs of police, attorneys for the POA and DSA, and a wide spectrum of community groups in an effort to expedite and improve the process. The result has been a new joint protocol for the investigation and review of officer-involved shootings and use of force. This protocol was signed by all local law enforcement agencies and took effect on January 1, 1997.

According to the protocol, the District Attorney's involvement in a shooting incident begins shortly after its occurrence. In the case of a fatal or potentially fatal shooting, the District Attorney's Office is notified immediately. A District Attorney Investigator (DAI) from Special Operations rolls to the scene of all use of force fatalities. Each of the investigators assigned has many years of patrol and investigative experience, including homicide investigations, prior to joining this office.

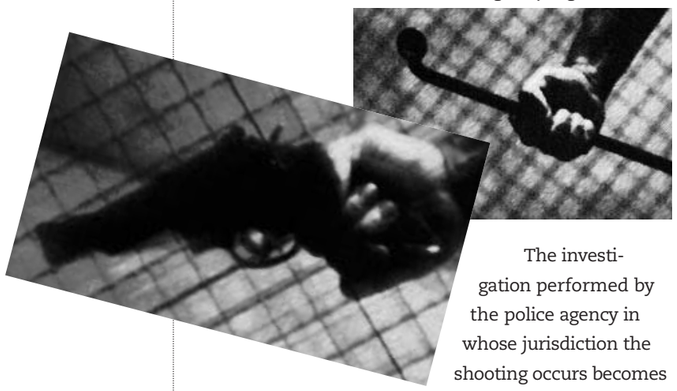
The homicide team provides a briefing and walk-though to the DAI at the scene. The DAI provides any investigative assistance requested. If the agency requests,

Weapon Photos by: Paul Bowers

Main Photo: Stock

a DAI can roll to the scene of a non-fatal shooting. Ordinarily, information regarding a non-fatal shooting will be provided by the agency on the morning following the shooting.

The protocol also requires a more thorough briefing in a fatal shooting. The assigned Deputy District Attorney and DAI meet with the homicide team a few days after the shooting. This provides an early opportunity to exchange views and for the District Attorney to obtain an early assessment of the events. Nevertheless, the police agency's investigation is wholly their own. The Deputy District Attorneys assigned to Special Operations are among the most experienced and have demonstrated consistent good judgment.



The investigation performed by the police agency in whose jurisdiction the shooting occurs becomes the primary resource for the District Attorney's review.

Typically, the agency completes its investigation anywhere from three to eight weeks after the shooting. At that point, the agency investigators present their investigation and conclusions to the District Attorney's Office. The assigned Deputy District Attorney and DAI review the materials, and perform an independent investigation to corroborate critical facts or acquire additional evidence. In appropriate cases, they may become involved in the agency's investigation at the outset, before it is submitted by the agency.

One of the goals of the District Attorney's review is the expeditious examination of the evidence. The sooner the review is completed, the sooner legitimate questions can be answered. And generally, the sooner the shooting officer can be returned to full duty.

Usually, the review takes less than 10 days after all reports and other investigative materials have been submitted. This is far better than the months that it once took to complete a review. Of course, the facts in some shootings have been clear from the outset, while others required substantial additional investigation.

One of the most important pieces of evidence to the District Attorney's review is the statement of the police officer or deputy involved in the shooting. He or she is the only witness who can relate all of the information he or she acted upon, present a picture of the inferences he or she drew, and describe his or her state of mind and motivation.

In some cases, all other witnesses may be hostile to the officer's interests. Thus, failure to give a statement may result in the District Attorney having less than a complete picture of the incident.

Fortunately, the growing majority of San Diego peace officers involved in line of duty shootings have given full and voluntary statements of their observations and actions. During one study in 1994 and early 1995, more than 80 percent of officers provided voluntary statements. Since January of 1997, only 3 out of 56 officers (5 percent) in line of duty shootings declined to give voluntary statements immediately following the event. Those three officers did however provide voluntary interviews several weeks after the shootings. Officers are also recognizing that the suspect has a family and friends who need an explanation for the shooting.

Paul Morley is Chief of the District Attorney's Special Operations Division. He has been a Deputy District Attorney for 25 years. He also has served in the DA's Appellate Division.

On completion of the District Attorney's review, a letter summarizing the facts and statements of the deputy and other witnesses is written. This letter, which includes a legal analysis of the propriety of the use of deadly force, is delivered to the chief of police or Sheriff as appropriate. Typically, these letters are released by the agency to the local media.

The high level of cooperation between all law enforcement agencies and the District Attorney adds to the continued success of this review process. This is not typical of all California counties. More importantly, independent review of line of duty shootings by the District Attorney increases public confidence in the use of deadly force by police officers. **LEQ**

SUICIDE BY COP

Kenneth Putt, a retired Navy Chaplain, had a recent history of mental disorders, and had been suicidal since 1995. On the evening of April 18, 1998, he refused his medication and became belligerent with his wife. When he began breaking household items, Mrs. Putt called police. She then went to a neighbor's house, but saw her husband sitting on the front porch with the porch light on – and a rifle across his lap.

Mrs. Putt called the police again from the neighbor's house to warn them. Officers parked a block away and approached on foot. When the officers came within sight of Putt, he stood up and pointed his rifle at the officers. The officers immediately took cover and ordered Putt to drop the weapon. One officer fired his shotgun but missed. Putt continued to aim his rifle at the officers. A second officer fired his 9mm carbine rifle twice, striking Putt in the torso. Putt died at the scene. When Putt's bolt action .303 rifle was examined, it was found to be unloaded and had not been fired.

The Putt case is an excellent example of "suicide by cop," a phenomenon increasingly encountered by officers. These are cases in which the subject uses the opportunity of a confrontation with a peace officer to help carry out a desire to end his or her own life. In some cases, like that of Kenneth Putt, there is evidence showing the confrontation was created by the subject for just this purpose. Often, the evidence shows the subject has talked for months or even years of suicide, and may have made suicide attempts.

It is likely that such cases have existed as long as there have been peace officers whose natural reaction is to defend themselves from real or simulated attack by deadly force. On the basis of officer-involved shootings reviewed by the District Attorney's Office, it appears the percentage of suicide shootings may be on the rise.

Over the last two years, this office has reviewed 38 officer involved shootings. Of these, at least six subjects are known to have spoken of suicide before the encounter with officers. Examples include a woman who admitted making a conscious decision to fire in the direction of a police officer to attract his fire as a way of ending her life, and a man who made the statement to his wife on several occasions that if you "pointed a gun at a cop, you were just asking to be killed," which is exactly what he later did.

But these six cases do not tell the whole story. In more than one third of the cases (14 of 38), the subject either spoke of suicide or demonstrated by his or her actions a desire to have the officer end his or her life. In most of these cases, the subject pointed a firearm – which was often unloaded, inoperable, or a replica – or came toward the officer with a knife or other potential weapon. The subject knew the officer would be forced to defend himself.

These are generally not cases involving an attempt to escape, nor is there any logical reason to explain the subject's conduct. In most of these cases, there was evidence the subject suffered from depression prior to the shooting, or some tragic event had occurred in their life shortly before. Several of the cases involve older men who had previously been law abiding but had just engaged in physical altercations with their wives.

Is there anything peace officers can learn from such cases? Perhaps analysis of "suicide by cop" cases by qualified psychoanalysts could provide some guidance.

But even if we could gain some additional insight, the fact remains that officers must protect themselves when confronted by the threat of deadly force by a suspect. Trying to divine the suspect's real intent in such a confrontation might increase the risk to the officer.

Rather, officers must rely upon their training and experience. Although officers will continue to face the "suicide by cop" dilemma, they will be judged by consideration of the circumstances of each incident and their state of mind. **LEQ**

Robert Phillips

Protect Your Informants! Seal Warrant Affidavits

Court Ruling Provides Powerful Tool For Protecting The Identity Of Informants.

Janet Marie Hobbs was suspected of possessing stolen property. Police based their suspicions on information from a previously untested informant. Just to complicate matters, the informant did not want Hobbs to know his identity. Yet, if Hobbs knew of the evidence the informant was providing, she would be able to figure out his identity.

So how do you convince a magistrate that the informant is reliable, obtain a search warrant and keep the informant's identity confidential, all at the same time?

In the *Hobbs* case, the informant's reliability was established by swearing him in and undergoing questioning by the magistrate himself. A tape recording and transcription of the hearing was prepared. This, together with another confidential attachment, became the affidavit justifying the issuance of the warrant.

When the magistrate observes the demeanor and appearance of an informant, the law is clear. The magistrate is in the best position to determine the informant's credibility. Under these circumstances, an informant can be found to be reliable, even though uncorroborated, and without a track record of providing reliable information. This is what occurred in the *Hobbs* case.

The more serious issue in *Hobbs* however, involved keeping the informant's identity confidential. Penal Code section 1534 requires that after execution of the warrant, or the expiration of 10 days from issuance of the warrant, the contents of the warrant, "including any supporting affidavits setting forth the facts establishing probable cause for the search, become a public record…" As a public record, the defendant is entitled to a copy.

In *Hobbs,* however, the magistrate sealed the tape recording, its transcription, and the confidential attachment; i.e., the entire affidavit. Janet Hobbs' subsequent motions to unseal these documents, quash (challenging the probable cause) and traverse (attacking the reliability of the informant's information) the warrant, suppress the evidence recovered when the warrant was served and to discover the identity of the confidential informant, were all denied. Adding insult to injury, a portion of this suppression hearing, was held "in camera," which means it was done in the judge's chambers without the defendant or his attorney being present.

The Defendant's Dilemma

You can see the defendant's dilemma. How can the validity of a warrant be challenged when he doesn't even get to see the affidavit describing the facts and circumstances the State feels establishes probable cause? The Appellate Court in *Hobbs* recognized the apparent unfairness of this procedure and reversed the trial court, holding that the defendant's "due process" rights were violated. The prosecution followed this decision with a petition to the California Supreme Court.

The Supreme Court reversed the Appellate Court. In appropriate circumstances, a part of, or even an entire search warrant affidavit may be sealed. The reasoning of the Court in *Hobbs* is important because it tells us when we may, and when we may not, lawfully keep a criminal defendant from obtaining access to a search warrant affidavit.

The Court's Reasoning

First, the *Hobbs* Court recognized the "inherent tension" between the need to protect the identity of a confidential informant and a criminal defendant's right of reasonable access to the information. Law enforcement's legal right to seal warrant affidavits comes about as a result of the courts balancing these two interests and tipping the scales in favor of protecting the informant.

An "Informant Identity Confidentiality" privilege is provided for in Evidence Code sections 1041 and 1042. Evidence Code section 1042(b) codifies "the common law rule that disclosure of an informant's identity is not required to establish the legality of a search pursuant to a warrant." Section 1042(c) further provides that an informant's information "is admissible on the issue of reasonable (or probable) cause to make an arrest or search without requiring that the name or identity of the informant be disclosed."

Opposed to these statutory protections for the informant is the defendant's constitutional due process right to challenge the probable cause of the search warrant. This admittedly important right, however, has been diluted to some extent. The Court recognized a defendant's motion to challenge the legality of a search is in reality an attempt to "escape the inculpatory thrust of evidence in hand by seek(ing) to avoid the truth."

Although there are exceptions, appellate court decisions have long held "the identity of an informant who has supplied probable cause for the issuance of a search warrant need not be disclosed where such disclosure is sought merely to aid in attacking probable cause."

However, this case law and statutorily recognized right to protect an informant's identity is of little value when the contents of a search warrant affidavit would help the defendant determine who the informant was. The importance of the *Hobbs* case is its recognition of "the well-established corollary rule that 'if disclosure of the contents of [the informant's] statement (to the police) would tend to disclose the identity of the informer, the communication itself should (also) come within the privilege'. . ."

By the way, this does not mean that sealing of a warrant affidavit is appropriate in all cases, or even when it is, that the whole affidavit must be sealed.

For instance, where only a portion of a search warrant affidavit, if disclosed to the defense, would effectively reveal the identity of an informant, the affidavit may be edited to remove the protected information. The defendant receives only the edited version.

Similarly, when editing is impractical because the informant's statement is in the form of a tape recording or transcription of an oral statement, the prosecutor may be ordered to write and give to the defense a narration of only those

Getting the Warrant Sealed

1. Prepare a warrant and affidavit in the normal manner, listing in the affidavit the reasons why the identity of the informant must remain confidential (e.g., such disclosure will greatly endanger the safety of the informant and will impair his future usefulness to law enforcement).

So far, all the case law dealing with sealing warrants involves the need to protect the identity of a confidential informant. The same arguments, however, could probably be made in any case where there is a reason to shield information under the "official information" privilege of Evidence Code section 1040, or to protect any other important governmental interest. But attempting to seal a warrant for any reason unrelated to informant confidentiality, if you can get a judge to approve it, will be inviting new case law.

2. If only a portion of the affidavit is to be sealed, put information into a separate affidavit. This will greatly ease the task of editing sealed parts from the rest of the warrant. Make sure the sealed portion is referred to and incorporated by reference in the body of the unsealed affidavit. There is nothing wrong with having more than one affidavit to a search warrant. If the informant is questioned by the magistrate, or in his presence, his recorded statement may be made an attachment to the affidavit and also separately sealed.

3. Describe in the affidavit how making the information you want protected a public record will necessarily reveal to the defendant your informant's identity. Include in the warrant affidavit, preferably at the end, a request for the sealing of the affidavit, or portions of the affidavit. For example:

"I respectfully request that this affidavit be sealed pending further order of the court. Without sealing, the affidavit (and supporting attachments) will become a matter of public record within 10 days (P.C. 1524(a)), and be made available to the defendant. Sealing is justified even against discovery by the defendant based on the governmental privilege that allows for the protection of the informant's identity (per E.C. 1041, 1042). (*People v. Hobbs* (1994) 7 Cal.4th 948.) The sealing of the affidavit is being requested in that due to the nature of the information contained herein (as described above), and because defendant is acquainted with the informant, it is believed defendant will readily determine that such information could have come only from the informant, thus revealing the informant's identity."

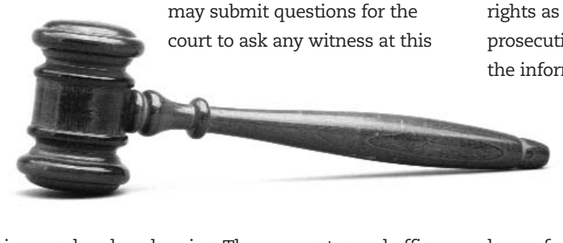
4. The warrant must contain a corresponding order by the court sealing the warrant affidavit – e.g.: "GOOD CAUSE appearing therefore, IT IS HEREBY ORDERED that the attached affidavit (and attachments thereto) be sealed pending further order of the court. IT IS SO ORDERED. (Dated and signed by the magistrate)."

5. Disclose the existence of a sealed affidavit of an informant or of the police officer affiant on the face of the warrant itself. For instance: "Proof, by affidavit, having been made before me by Agent John Jones and a cooperating individual whose affidavit has been sealed that there is probable cause. . ."

6. Have the issuing magistrate place any sealed portions of an affidavit into an envelope, noting on the envelope something like this: "The contents of this envelope are ordered sealed and are to remain sealed and in the custody of (officer or court clerk) until further order of this court or any other competent court. (Dated and signed by the magistrate)."

facts upon which probable cause is based, leaving out those portions which would assist the defendant in determining the identity of the informant.

Since denying a criminal defendant access to a search warrant affidavit is an exception to the normal rule of full disclosure, it clearly follows that the affidavit may only be sealed when necessary to protect some important governmental interest, such as the identity of an informant. And even then, only those portions of an affidavit "which necessarily would reveal the identity of a confidential informant" may be sealed. The rest of the affidavit must be given to the defense.



Defendant's Challenges to the Warrant:

After the warrant is served and a case is filed, you can expect the defense to file motions to quash and traverse the warrant, unseal the sealed affidavit and other exhibits, to suppress evidence, for discovery, to reveal the informant's identity, and anything else they can think up.

Should the investigating officer wish to continue the anonymity of the informant, it will require him or her (or the prosecutor in the officer's absence) to invoke the informant privilege, pursuant to Evidence Code section 1041.

Assuming the affiant officer determines the informant's identity should remain confidential, and the privilege is invoked, the trial court is then required to conduct an "in camera" hearing pursuant to Evidence Code section 915(b). Because, where the affidavit is sealed, the defendant has been deprived of access to all or part of the information related to these motions, his attorney will not be required to make any preliminary showings as he would be when the affidavit is not sealed.

The trial court is obligated to review all the relevant documents for the defendant, including the sealed affidavit, police reports and any other information regarding the informant and the informant's reliability. This review occurs out of the presence of the defendant and his attorney, although the attorney may submit questions for the court to ask any witness at this hearing. The prosecutor and officer should be present so that the People's interests are represented. If necessary, the court may require the informant to testify, preferably at some time and location unknown to the defendant.

In reviewing these documents and interviewing witnesses, the court must first determine whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. Should the continued confidentiality requirement be met, then it must be determined whether the entire affidavit or any major portion is properly and necessarily sealed. Be prepared to demonstrate how the defendant would recognize information in the sealed affidavit as coming from the informant.

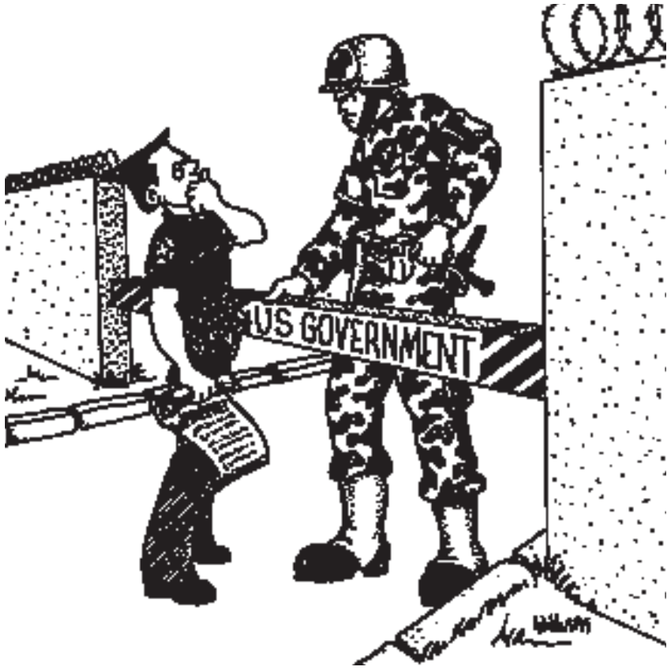
If the court agrees sealing is still necessary, the court is then required to protect the defendant's interests in his absence by considering both whether the warrant is supported by probable cause (motion to quash) and whether there exist any intentional or reckless falsehoods in the affidavit (motion to traverse). All the court's conclusions will then be reported back to the defendant in open court and ruled upon accordingly.

Conclusion

This, the *Hobbs* court held, sufficiently protects the defendant's rights as well as those of the prosecution, law enforcement and the informant. While it was dope that was found at Hobbs' house, as opposed to stolen property, this was not the issue. The *Hobbs* decision is important to law enforcement because it provides us with a powerful tool for protecting confidential informants and other privileged information.

Police officers wishing to seal a warrant affidavit must remember, however, that such a procedure is the exception to the normal rule of full disclosure. In each case, it must be specifically justified. As a matter of course, seeking to seal warrants, with little or no reason to do so, may both lead to court-imposed sanctions in the case where sealing is used as well as diluting the benefits of this procedure in those cases where sealing is really necessary. **LEQ**

Bob Phillips is a Deputy District Attorney and the liaison to the Sheriff's and Marshal's offices and the Carlsbad, Escondido, Oceanside, El Cajon and La Mesa police departments.



Serving Warrants And Arrests On Naval Bases And Vessels: You're Not In California Anymore

By Special Agent Edward J.L. Jex
Naval Criminal Investigative Service

A Navy sailor commits a crime in your jurisdiction. You contact a deputy district attorney, who agrees you have enough information for an arrest. You proceed to the sailor's ship berthed at 32nd Street Naval Station and make a probable cause arrest.

A Marine, living on Camp Pendleton, has crime evidence in his barracks room. You obtain a state search warrant and head to the base to serve it.

During the investigation of a crime, you discover several important military witnesses have shipped out to the Middle East. Your agency won't fly you around the world, so you have to wait until they come back, or drop the case.

Although these scenarios sound pretty straightforward, the arrest is probably illegal; the search warrant and all evidence seized will most likely be thrown out of court; and the case will no doubt become stale while you are waiting for a witness to return from a tour of duty.

Many San Diego law enforcement officers have had similar incidents and the associated problems arise. Considering the size of the military community in San Diego County, its not surprising.

More than 123,000 active duty service personnel reside in the county. About 129,000 family members (husbands, wives, children) of sailors and Marines live here. More than 22,000 civilian employees of the Department of Defense and about 58,000 retired military personnel are in San Diego. On any given weekend, thousands of San Diego area residents are on active military duty as members of the Reserve or National Guard. The Department of the Navy owns in excess of 178,000 acres of land in the county, and "home ports" some 70 ships here.

Federal vs. State Jurisdiction

All naval vessels, and many areas of the military bases in the county (including nearly all of Camp Pendleton), are *exclusive* or *partial federal jurisdiction*. This means only federal laws can be enforced on the vessel or base. State and local officers have no statutory authority in these locations, although some bases have portions that fall under state jurisdiction. These areas are known as *concurrent* or *proprietary jurisdiction*. The problem is, in most places, these areas can be determined only by lines drawn on old maps. For example, while all 32nd Street Naval Station vessels are exclusive federal jurisdiction, some of the piers where they are berthed fall under state jurisdiction. Which pier is which? As in locations where city, county or state boundaries come together, you must be standing on the right side of the line when making a jurisdictional call.

Here are two other considerations. Commanding officers are legally prohibited from allowing service members to be arrested aboard a vessel or base unless the arresting agency has (1) a lawful arrest warrant, and (2) agrees in writing to return the member to the command when the agency or other judicial authorities have concluded their business.

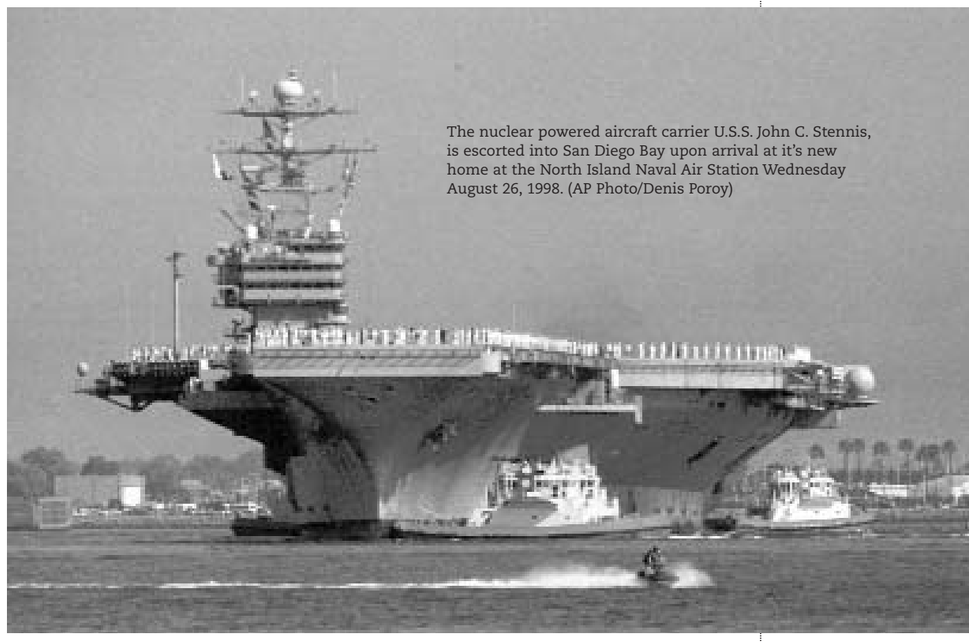
Since no one wants to make a technical error that will free a criminal, or to watch a case go stale and die, what is the answer? Actually, it's quite simple. When you need to make an arrest, conduct a search on a Navy or Marine Corps facility, or contact military personnel on a case, call the Naval Criminal Investigative Service (NCIS).

For those not familiar with NCIS, it is a civilian federal law enforcement agency chartered to investigate serious crimes and national security matters affecting the Department of the Navy. The main NCIS office in San Diego County is located at the 32nd Street Naval Station, with resident offices at Naval Air Station North Island, Marine Corps Air Station Miramar, and Marine Corps Base Camp Pendleton. In addition to employing special agents who are knowledgeable in dealing with federal and military jurisdiction issues, NCIS has access to military attorneys authorized by the Department of Defense and the U.S. Department of Justice to deal with civilian matters.

Let's take another look at our case scenarios. In the first one, the detective should call NCIS at 32nd Street and explain who he wishes to arrest and why. NCIS will assign a special agent to assist the detective. The agent will contact the suspect's command and arrange to have him at the NCIS office when the detective wants to make the arrest. The agent will also arrange to have a Navy lawyer present with the paperwork necessary to turn over the suspect. The arresting officer will need to have a copy of the arrest warrant for the suspect. Probable cause arrests cannot be made on the base by state or local officers. This same procedure should also be followed if an officer wishes to arrest civilian dependents or Department of Defense employees on the base.

In the second instance, the detective should call the NCIS office on Camp Pendleton and explain the case. Once again, an agent will be assigned to assist. There are basically two types of search warrants that can be served on a military vessel or base. The first is a federal search warrant issued by a federal magistrate judge. These can only be obtained by federal officers. It should also be noted that federal courts are generally reluctant to issue federal warrants for service on military facilities, unless there are unusual extenuating circumstances.

The second, and preferable search warrant for a base or vessel, is called a "Command Authorized Search." Commanding officers are empowered under the Uniform Code of Military Justice to act much like a



The nuclear powered aircraft carrier U.S.S. John C. Stennis, is escorted into San Diego Bay upon arrival at it's new home at the North Island Naval Air Station Wednesday August 26, 1998. (AP Photo/Denis Poroy)

Naval Bases and Vessels

Illustration: David Williams

Photos: Associated Press

The U.S.S. Valley Forge based in San Diego, commanded by U.S. Navy Cmdr. W. James Kear. (AP Photo/U.S. Navy, Felix Garza Jr.)

magistrate in ordering searches on vessels or bases. The standards of probable cause are the same as in the civilian judicial system. The NCIS agent will take the information you have on the case, or the prepared affidavit for the state's warrant, and make it an attachment to his affidavit for the Command Authorized Search. The agent will affiate before the commanding officer and will be responsible for conducting the search. The detective can accompany the agent on the search as an observer. Any evidence seized will be entered into the NCIS evidence system and immediately released to the detective. Granted, this is an additional "hoop" to jump through, but it is the only way to ensure the search is allowed into court.

For the lawyers reading this, a military judge can also issue a Command Authorized Search. As a rule, the Department of the Navy prefers searches be obtained from the cognizant commanding officer.

Under the third scenario, if you need interviews, interrogations, searches, etc., for a suspect or witness who is now overseas, call NCIS. There are offices and agents located wherever the Navy and Marine Corps can be found, including ships at sea. The San Diego office will contact the appropriate office abroad and conduct the requested investigative steps.

Approximately 10 percent of all NCIS cases involve such assistance to other law enforcement agencies. If your case involves Army or Air Force personnel, the Air Force Office of Special Investigations and the Army Criminal Investigation Division Command, have agents in the San Diego area. The Army agent is located at the NCIS office on Camp Pendleton. The Air Force agents are co-located at the NCIS office on 32nd Street Naval Station.

One final note: the military will not pay to return a member back to the U.S. on behalf of a state or local agency. If you need a suspect or witness returned for trial, NCIS can help facilitate the matter. The cost of airfare, lodging, etc. must be borne by the requesting agency. As a possible alternative, NCIS can inform you when a member is due to return to the U.S. as part of a normal transfer cycle, return from deployment, or in anticipation of discharge from the service.

In summary, when you step onto that base or ship, you're not in California any more. Fortunately, NCIS is available to serve as a guide and assistant in this "other jurisdiction." **LEQ**

Special Agent Edward Jex has 19 years experience in federal law enforcement, and has been assigned to the San Diego area since 1987. He is presently serving as a supervisor on the North County Regional Gang Task Force.

NCIS can be reached at:

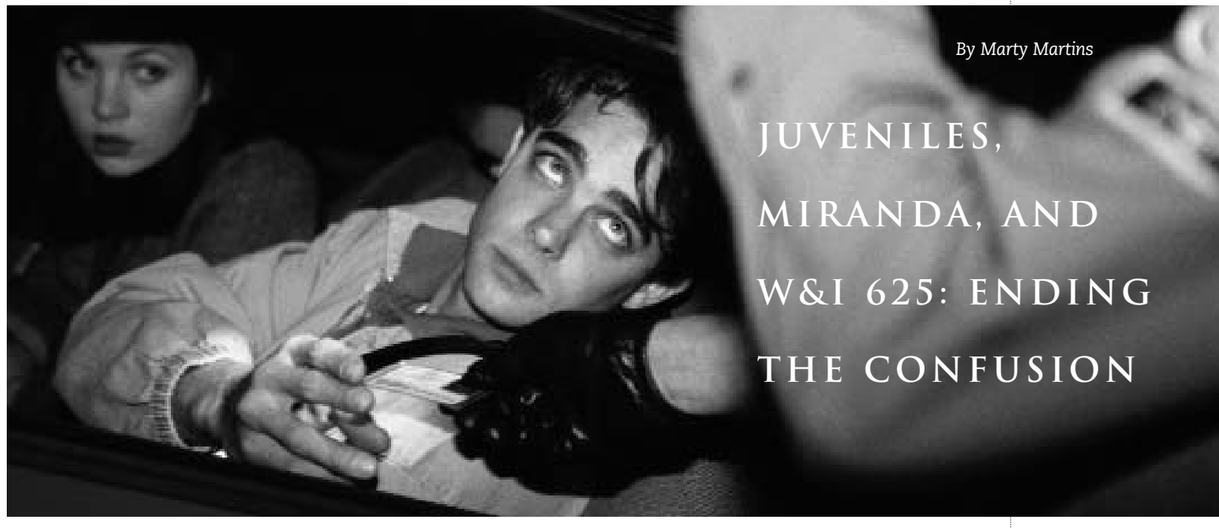
Field Office San Diego:
(619) 556-1364

Resident Agency North Island:
(619) 545-9427

Resident Agency Miramar:
(619) 537-4355

Resident Agency Camp Pendleton:
(760) 725-5150

After hours, weekends and holidays, page the NCIS duty agent at: (619) 969-9652.



By Marty Martins

JUVENILES, MIRANDA, AND W&I 625: ENDING THE CONFUSION

Detectives from City A, working a robbery series, took a juvenile into custody. Following departmental policy, the detectives immediately advised the young crook of his right to remain silent and to have counsel present. If necessary, appointed counsel would be provided during any questioning. Not happy with being in handcuffs, especially since his friends were watching, the juvenile asked for a lawyer. The officers were then precluded from asking him any questions outside of routine booking information.

In City B, detectives were also working a robbery series resulting in the arrest of a juvenile. The detectives were expected to comply with all their statutory obligations, including W&I 625. However, because 625 doesn't indicate when the advisal must be given, City B leaves it up to the discretion of the officer. Consequently, after the detectives took their juvenile suspect back to the station, they informed him of his right to two phone calls. While under constant observation by a CSO, Junior was allowed to calm down in a special, padded cell reserved for juveniles. Meanwhile, the detectives placed a phone call to the kid's parents.

A short time later, the detectives moved him from the holding cell to an interview room. They asked if he needed to use the restroom and offered him something to drink. The detectives also told him they were interested in hearing his side of the story. But, they explained, before he spoke to them, the detectives needed to advise him of his *Miranda* rights.

After listening to them, Junior said he understood the rights and agreed to speak with the officers. Although he tried to downplay his involvement, he made enough admissions to nail both him and his confederate. Later that day, just before a patrol unit transported the kid to juvenile hall, the detectives advised the minor of his rights under W&I 625.

Although these stories are fiction, they might be closer to the truth then you think and, like all fables, each story has a moral.

Ever since the landmark ruling of *Miranda v. Arizona* in 1966, police officers have had to advise adult suspects of certain rights before any custodial interrogation. Anyone who has watched television, even intermittently over the past three decades, can probably recite these rights by heart. The very next year, the Supreme Court decided *In re Gault*, ruling that juveniles also fell within the *Miranda* rule.

Not long thereafter, the California Legislature amended section 625 of the Welfare & Institutions Code to add a paragraph requiring any officer who takes a minor into custody to advise him of his constitutional rights and certain other enumerated rights mentioned in the statute.

Juveniles Taken Into Custody Must Be Advised

According to W&I 625, in any case where a minor is taken into temporary custody, the officer shall advise such minor that any-thing he says can be used against him and shall advise him of his constitutional rights,

including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel.

Remember the old saying: if it looks like a duck, walks like a duck, and talks like a duck, it probably is a duck? But that's the trouble with W&I 625. It looks and sounds like a *Miranda* advisal – but it's not!

Constitutional Rights?

First of all, notice the requirement in 625 to advise minors of their constitutional rights. (Given what I've read in the newspapers lately about the average high school student's knowledge of this country's Constitution, it is unlikely most juveniles would have an inkling what an officer was talking about if he or she, in fact, did advise them of their constitutional rights. But, I digress.) A recitation of the *Miranda* warnings would not be an advisal of "constitutional rights," especially given the vagueness of W&I 625. It is probably safe to say, from the day the last paragraph was tacked onto 625 until today, no officer has actually advised a minor of his "constitutional rights." More to the point, *Miranda* admonishments are not constitutionally mandated. You can read the U.S. Constitution from now until the next issue of *Law Enforcement Quarterly* hits your squad room and you will not find the word "*Miranda*" or even the four recognized warnings anywhere in it.

The "prophylactic" purpose of *Miranda* is to protect against abuses of one's rights against compulsory self-incrimination, not to provide criminal suspects with an independent constitutional right. (*New York v. Quarles*, citations omitted for brevity but available upon request.)

In *People v. Montan*, the court wrote "The familiar warnings required by *Miranda* are at present construed as judicially declared rules intended to secure the constitutional right against self-incrimination, but the warnings are not themselves rights of constitutional stature. 'The right to silence described in those warnings derives from the Fifth Amendment and adds nothing to it.'

The warnings are only a means toward the end of safeguarding the suspect's Fifth Amendment rights."

Further, the Welfare & Institutions Code says nothing about when the 625 advisal must be given, only that it must be given at some point after a minor is taken into custody. Interestingly, some departments have given a literal interpretation to the word "where" and feel the 625 has to be recited at the actual location, safety permitting, at which the minor is taken into custody.

Miranda v. Arizona and its prolific progeny are consistent in holding that the *Miranda* admonishment is not required unless two events are ready to occur together: one, the police want to question someone and, two, that someone is in custody, meaning, under arrest or its functional equivalent.

This chain of events is something like a solar eclipse. If the moon and sun don't align perfectly, no eclipse. Unlike the lack of temporal definition in section 625, *Miranda* case law has laid out for police definite events that can be objectively discerned in order to determine when a *Miranda* advisal is necessary.

A full discussion of the numerous cases defining when a person is "in custody" for *Miranda* purposes, as opposed to consensual conversations, even if held within a police building or jail cell, is outside the scope of this article, however.

Understanding and Waiving

For someone to waive his or her Fifth and/or Sixth Amendment rights following a *Miranda* advisal, the prosecution must be able to show the waiver was knowing, intelligent and voluntary.

The courts have held that a minor can waive his rights. A determination of whether a juvenile understood what he was doing will rest upon the "totality of the circumstances." Factors the courts will consider include the minor's age, experience, education, background, intelligence and criminal sophistication, also, the court will consider not only whether the minor had the capacity to understand the warnings given, but the nature of his Fifth Amendment rights, and the consequences of waiving them. (*Fare v. Michael C.*)

Thus, depending on these factors, an officer may have to spend more time explaining in terms the juvenile can understand what remaining silent, having statements used against him and appointed counsel mean. (The advantages of having your fatherly instruction on the nuances of the *Miranda* warning preserved on a tape recording should be obvious.)

After reading the *Miranda* advisal to a juvenile, plus whatever supplementary explanation may need to be provided, how does an officer determine if the kid comprehends what the officer has just read to him?

How can the officer feel somewhat confident the waiver will be knowing and intelligent? Ask the minor if he understands, the same way it is done for adults!

If you're working off the new POST-approved *Miranda* card, your suspect will have four chances to say he understands.

But let's take another look at section 625. There doesn't appear to be any requirement to ask a juvenile if he understands the 625 admonishment. More importantly, there is no provision in 625 mandating the officer to obtain a waiver. This is another example of W&I 625 being a poorly-worded statute disguised in a *Miranda* costume.

625 Within *Miranda*

Now look at the standard *Miranda* advisal. With the exception of requiring a minor to be advised of his "constitutional rights," is everything listed in section 625 already printed on your departmentally-approved *Miranda* card? Yep. If Junior waives his federally-created *Miranda* rights, will it also be a waiver of the statutory rights mentioned in 625 (even though such a waiver is not required)? Absolutely.

The Supremacy Clause in our national Constitution prevents any state, including California, from adding or subtracting anything from the federal interpretation or application of *Miranda* or the Fifth Amendment. Likewise, no state legislature can create a federal or state "constitutional right" merely by enacting a statute.

As California law enforcement officers, we have sworn to uphold the laws of this state, and that includes W&I 625. But, for the sake of argument, let's say an officer mistakenly or intentionally failed to comply with 625. Would we lose any admissions made by the juvenile? No.

Non-compliance with 625 would have no effect on the admissibility of a properly-obtained admission or confession. Since California voters passed Proposition 8 in 1982, the admissibility of evidence in California courts is governed exclusively by federal constitutional law. As seen above, a state statute can neither add to nor delete from federal law.

By now, it should be clear – absent any departmental policy to the contrary – an officer can kill two birds with one stone by preceding any questioning of an in-custody juvenile with a *Miranda* advisal, which will also serve to comply with W&I 625. On the contrary, going through a 625 advisal first will not comply with *Miranda* and a separate *Miranda* admonishment will still have to be given. Worse, with a premature 625 spiel, one risks the juvenile asking for a lawyer, thus foreclosing an officer from going on to a post-*Miranda* interview.

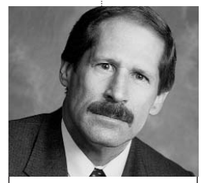
This is even more likely the closer the 625 advisal is to the time the minor is taken into custody.

Conclusion

Until such time as the state law may be changed, law enforcement officers in California must continue to live with Welfare & Institutions Code section 625. The following three points should help you co-exist with this statute.

- If your department mandates when you should give the W&I 625 advisal, adhere to departmental policy. It's regulation; it will keep you from getting jammed up with your sergeant and prevent some defense attorney from attacking you on the stand for failing to comply.
- Absent such a policy, if you intend to question an in-custody juvenile suspect, read the *Miranda* advisal to him, make sure he understands, and obtain a waiver or invocation. You will, in essence, have complied with the intent of W&I 625.
- If initially you do not plan to interview the juvenile and have the discretion to give the W&I 625 advisal whenever you think best, consider giving it shortly before the juvenile leaves your custody. In the event you (or some other officer or detective) change your mind and do decide to *Mirandize* and question the minor before he is released or transferred, you will be covered.

Readers are also encouraged to refer to the write-up in the California Peace Officers Legal Sourcebook regarding juveniles and the *Miranda*-625 dichotomy. **LEQ**



Marty Martins has been a deputy DA for over 11 years. He is the District Attorney's Liaison to the Narcotic Task Force, Highway Patrol, and the three South Bay police departments. Martins is a regular contributor to Law Enforcement Quarterly.

Effective Investigations in Cross-Cultural Communities

by Hector M. Torres, Ph.D.

"Why is it difficult to conduct investigations with certain groups of victims and not others?"

As a police psychologist and a consultant with the U.S. Department of Justice, I have been asked that question by law enforcement professionals many times. They usually tell me that they treat everyone equally and don't understand why certain individuals just don't cooperate. When I ask who these certain individuals are, I am told that they are either members of minority groups or immigrants. Sometimes I ask, "What specific immigrant group are you talking about?" Usually, they can't be more specific than a Hispanic, Asian, African or Middle Eastern group member. This information tells me that the investigator does not differentiate these populations beyond broad generalizations.

The first thing a police officer needs to know is – "Who is this victim?" Sometimes officers will make comments such as "Why do I need to know that? All I want are the facts related to the investigation" or, "If they are going to live in America, they should learn to be like everyone else. They are the ones that keep themselves separate." Or, some officers might not want to risk being perceived as insensitive. "It's not that I don't want to find out who they are, it is that I don't want to risk being politically incorrect – and put my foot in my mouth."

Arguments like this can be made until you are blue in the face, but reality is not going to change. To be effective, law enforcement officers need to interact with people from a variety of cross-cultural/immigrant groups. These groups also have their own peculiar issues related to law enforcement.

For example, I was contracted to train for a law enforcement agency in New England. My contact person was a captain. When I asked him about the community demographics, he told me that they needed to have more training on how to work with Chinese immigrants. I asked him if he was sure that he needed information

about Chinese immigrants. He said yes. When I arrived in the city, I had a police lieutenant take me to this "Chinese community." It turned out to be a Vietnamese community with only a few Vietnamese Chinese. They were shocked to find out that the community was

Photos by Erika Kyte

Vietnamese and stopped their efforts at recruiting a Chinese-speaking police officer.

Sometimes groups of people resemble other groups and are misidentified by law enforcement. Take for example, a Guatemalan Indian who comes to San Diego illegally and is the victim of a crime. A Spanish-speaking police officer is sent to assist the victim. The police officer asks the victim for information in Spanish, thinking that the victim is Spanish-speaking from Mexico. The police officer is met with silence and no eye contact. The officer does not realize this individual does not speak Spanish and becomes increasingly frustrated at the lack of response.

To prevent such problems, check with the Immigration and Naturalization Service (INS), social service agencies and local organizations, such as school and churches to determine the ethnic make-up of the community. Had this been done in the above case, the officer would have known that the victim did not respond to Spanish because he spoke another language.

A vital reason for finding out a person's origin is to assess how the victim might feel about law enforcement. Compare two people from neighboring countries, Nicaragua and Costa Rica, for instance. Nicaragua is a country that has been plagued with civil war and violence. Until recently, its citizens were victimized by both the government and rebel forces. There have been reports law enforcement officials were responsible for innocent people being killed. It would be normal for a person from Nicaragua not to trust the government for fear of reprisal. Directly south of Nicaragua lies Costa Rica. The citizens there voted to decrease their military and to increase their education system. The citizens of Costa Rica generally see law enforcement as user friendly – law enforcement is respected and not feared.

Personal experience determines how people will respond. If a person comes from a country where law enforcement can't be trusted, their initial reaction is that law enforcement is generally corrupt. The more visibly corrupt law enforcement is in their country of origin, the stronger the response.

Further, when a person comes from a country where there is corruption or the person has experienced trauma, he generally feels very good about being in the United States. If that person experiences a trauma or becomes the victim of crime, their response will usually be based on their first experience or beliefs about law enforcement. This response is automatic and may even occur when the law enforcement professional is trying hard to relate to the victim. The reason for this is that the victim is generally unaware of the law enforcement process for conducting investigations in the United States.

When a person is a victim of a crime, he expects to be interviewed by a police officer and to give a statement. When a detective or investigator from the district attorney's office comes to re-interview the victim, the victim may decide that the second interview is occurring because law enforcement officials don't believe them. If there is yet another interview, the victim's fear of not being believed may be exacerbated. As a result, the victim may develop a strong fear that he might be incarcerated or the investigator might read the victim's nonverbal language and interpret it as "this person is not giving me all the details or telling the truth."

Not being aware of the process of law enforcement investigations can create a high level of stress for the victim. This stress is automatic and even people who are familiar with the process of an investigation will, at times, become stressed. For example, a police officer who has been involved in a shooting might be interviewed several times about the shooting. After being interviewed a few times, that officer might begin to wonder if he is not being believed by the investigator. When this happens, it is normal for the officer to have doubts and fears about the investigation process.

The best way to maintain victim cooperation throughout an investigation is to explain how the investigation will be conducted. This explanation should be continuously repeated to reassure the victim and monitor how he is doing. When a victim is first contacted by the responding officer, that officer should explain to the victim that he is writing a report which will be assigned to a detective. Then, the officer should tell the victim that the detective and/or the DA investigator will probably have some more questions to ask and that this is a normal part of the process. This reassures the victim that further questioning is not because the police don't believe him.

The victim's frame of mind should be evaluated at every step. First, it is important for the victim to feel supported throughout the process. This is especially true if the trial and investigation are lengthy. Second, it allows the investigator to assess if the victim is wavering about testifying. The investigator can also monitor whether the victim is receiving threats concerning upcoming testimony. In some communities, victims might hesitate to report a crime because they fear reprisal.

If the victim is not fluent in English, the investigator needs a translator who is well-acquainted with the legal process. This translator should be able to explain the process without biasing the investigation.

Many times victims are conversationally fluent in English – in other words, they can explain how they feel – but they may be unable to understand complex issues related to law and the investigation in English.

Although these suggestions are just a start, a clear understanding of a victim's background, cultural underpinnings and views about law enforcement will enable you to conduct more effective investigations. **LEQ**

Dr. Torres may be reached at (949) 855-7570 or email at torres2@ix.netcom.com

Hector Torres is a former police psychologist with the San Diego Police Department. He has worked as a consultant for the U.S. Department of Justice and is on the faculty of the National Judicial College. Currently, Torres is associated with Health and Human Services Group (HHSG), a company that provides psychological services to public agencies, where he oversees the Drug Enforcement Administration's Employee Assistance Program.

COMMENDATION OF THE QUARTER

By Denise Vedder

Rich Powers, left, Dana Gassaway, Larry Davis

It was an ordinary Friday night in July 1995. Chula Vista Police detectives Rich Powers and Larry Davis were called to an apartment complex to investigate the possible homicide of a child. It was their first homicide investigation, both as a team and as individuals, so they wanted to make certain everything was done by the book.

The following Monday, Dana Gassaway, an investigator from the District Attorney's office become involved in the case. Gassaway, with more than two decades of law enforcement experience, is a seasoned veteran of child abuse and homicide cases.

At the time, these three knew they were dealing with a terrible crime. A three-year-old girl was dead. Genny Rojas had been burnt so badly that her skin melted. She had black eyes, bruises, burns and lacerations on her neck, wrists and most her body. Her little face had unusual scars and there was no hair left on her little head. But, they had no idea they were about to play pivotal roles in what was to unfold as the worst case of child abuse in San Diego County history. And, little did they know the partnership they were about to form would last three years and through two trials and three penalty phases.

Group photo by Mary Kristin

When it was all over, a husband and wife – Ivan and Veronica Gonzales – would each be found guilty of first degree murder with special circumstances. The Gonzaleses would become the first married couple sentenced to death row and be among first child abuse/murder defendants sentenced to death.

The work of Gassaway, Powers and Davis would be praised by all involved in the case, including the District Attorney's office, the judge and even the jury that convicted one of the defendants. In a move that may be unprecedented, the jury deliberating Veronica Gonzales' fate was so impressed with the investigation, they wanted the detectives to be there for the reading of the verdict.

"It seemed to be the jury's way of sending a message after the blistering attack by defense attorneys on the detectives' credibility," says Dan Goldstein, the deputy district attorney who successfully prosecuted both cases.

Goldstein credits the diligence of Powers, Davis and Gassaway with helping to unfold the terrible history of abuse inflicted on Genny. "It was not a simple case – there was a lot of forensics and a lot of unknowns – it required a lot of patience and willingness to work the case." says Goldstein. "Nobody whined. They just did it."

The Gonzaleses' own six children were the only witnesses to the horrific abuse inflicted on Genny and to the events leading to her death on July 21. "The questioning of the children took quite a bit of skill and patience to obtain information that would be defensible in trial," says Goldstein. "Although the children were not permitted to testify at the trial, their videotaped testimony was allowed in court. This testimony was crucial to proving that both parents were involved in the abuse."

The careful, videotaped interviews of the defendants' confessions would also prove pivotal to refuting defense claims of "abused husband" and "abused wife" syndrome.

Rich and Larry, who have been with Chula Vista PD for 13 years, are quick to compliment their department.

"We are fortunate that we had such excellent people backing us up. When the patrol officers arrived on the scene, they quickly realized that the crime had been committed in another apartment, not the one where the victim was found. They quickly secured both crime scenes, which turned out to be crucial to collecting evidence. Our lab was meticulous in documenting evidence and keeping it organized for three years. And our Chief supported us so that we could marshal the resources to work this case properly."

For their work on this case, and their role in helping to bring Genny's torturers to justice, Chula Vista Police Detectives Rich Powers and Larry Davis and DA Investigator Dana Gassaway are the recipients of the *LEQ* Commendation of the Quarter. **LEQ**

PROFILE IN LAW ENFORCEMENT

By Jennifer Rubalcava, Deputy District Attorney

Photo by Erika Kyte

An Interview With The Local FBI Chief

William Gore
Special Agent, Federal Bureau of Investigation

William Gore, Special Agent in Charge of the San Diego FBI office, never really considered a career other than law enforcement. His father is a former assistant chief of the San Diego Police Department. His brothers, as well as numerous cousins and uncles, have careers in law enforcement.

Gore was born in San Diego and attended local schools. After graduation, he remained in the area and received his Bachelor of Arts degree from the University of San Diego. He planned to attend law school, but Uncle Sam had other plans. He was drafted and served as a U.S. Navy fighter pilot near the end of the Vietnam War.

As head of the San Diego office, which is the eleventh largest FBI office in the nation, he manages 200 special agents and 120 support staff.

"There are not too many jobs that after 28 years, you still wake up every morning and look forward to going to work. I'll never be a millionaire, but I feel like I'm making an impact."

What Was Your Most Challenging Assignment?

Managing my first office as Special Agent in Charge, which was in Seattle. After spending 28 years going up in an organization, here's your opportunity to put your ideas to the test and to implement your management style. It's not as exciting as kicking doors, or storming airplanes – but I'm too old to do that anyway.

Describe Your Management Style.

Just like my dad's. I often reflect on dinner table conversations with my dad, who was an assistant chief of police for San Diego Police Department. I try to make difficult decisions and still be considerate of other's views and opinions. I try to remember the old Golden Rule.

Do You Have A Motto?

Attitude is everything. You only go through life once – you can make a choice to go through with a smile on your face. I have lived in cities and held posts that are not as enjoyable as others. You can choose to enjoy it, or make yourself miserable if you want to. Attitude is especially important as you move into senior management. Your attitude will filter down through the organization. I'd like to be remembered as someone who cared about the organization and its people and tried to make it better for them.

What Challenges Does the FBI Face in the Next Century?

The major issue facing the FBI in the next decade is cyber crimes. This presents an immense challenge to FBI and all of law enforcement. The same way the automobile changed us in the '20 and '30s, the computer will change us into the 21st century. The majority of major crimes, even international crimes, such as terrorism will be conducted through the computer. Here in San Diego, we've formed a cyber crime squad to address cross-investigative issues with other law enforcement agencies. We also are exploring the feasibility of a forensic lab that could be equipped to handle the high-tech computer searches.

Describe an Exciting Moment In Your Career.

During the '70s, when I was on assignment in Seattle, we stormed a plane with hijackers on board. Even though you are thoroughly prepared and trained for your assignment, you are terrified. You wonder, "Are the legs going to do what the brain has been trained?" You train and train until you hope that the training will take over – but you don't know until you do it. **LEQ**